STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals:
Servitto, P.J. and Donofrio and Saad, JJ.

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

vs. Supreme Court No. 135888

HARVEY EUGENE JACKSON,
Defendant-Appellant.

Macomb Circuit No. 06-4473-FH
Court of Appeals No. 282579

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

BRIAN A. PEPPLER
President
PAAM

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research, Training, and Appeals

MARILYN A. EISENBRAUN (P35968)
Assistant Prosecuting Attorney
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
313-224-5794

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Statement of Jurisdiction

Amicus accepts and adopts Appellant's statement of jurisdiction.

Statement of Issue Presented

I.

THE REQUIREMENT THAT A DEFENDANT'S FINANCIAL CIRCUMSTANCES BE CONSIDERED WHEN IMPOSING THE COSTS OF APPOINTED COUNSEL IS NOT REQUIRED BY STATUTE OR CONSTITUTIONAL PROVISIONS. *PEOPLE V DUNBAR* IMPOSED THAT REQUIREMENT BASED ON AN INCORRECT ANALYSIS OF FEDERAL PRECEDENT. SHOULD *PEOPLE V DUNBAR* BE OVERRULED?

The People answer, "Yes."
Defendant answers, "No."
Amicus answers, "Yes."

Statement of Facts

Amicus accepts and adopts the statement of facts set forth by the People.

Argument

I.

THE REQUIREMENT THAT A DEFENDANT'S FINANCIAL CIRCUMSTANCES BE CONSIDERED WHEN IMPOSING THE COSTS OF APPOINTED COUNSEL IS NOT REQUIRED BY STATUTE OR CONSTITUTIONAL PROVISIONS. *PEOPLE V DUNBAR* IMPOSED THAT REQUIREMENT BASED ON AN INCORRECT ANALYSIS OF FEDERAL PRECEDENT. *PEOPLE V DUNBAR* SHOULD BE OVERRULED.

Standard of Review

This Court reviews questions of constitutional law de novo.[1] The plain error standard of review applies to unpreserved challenges to the order for reimbursement of attorney fees.[2]

Discussion

A. Whether *Dunbar* was correctly decided.

Except insofar as it acknowledges that challenges will be premature when a defendant has not faced sanctions for failing to pay the assessed costs of appointed counsel, the *Dunbar*[3] analysis was incorrect in 2004, and is untenable in light of the current versions of 769.1k(1)(b)(iii) and 769.34(6), which explicitly grant the trial court discretion to impose this cost at sentence.

Amicus joins in the People's support for the reasoning expressed in Justice Corrigan's dissents on this issue,[4] and writes separately to urge this Court to overrule *Dunbar*, which not only

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[1] *People v McCuller,* 479 Mich 672, 681 (2007); *People v Petty*, 469 Mich 108, 113 (2003)

[2] *People v Carines,* 460 Mich 750, 763, 774 (1999)

[3] *People v Dunbar*, 264 Mich App 240 (2004)

[4] See *People v Carter*, 480 Mich 1063 (2008); *People v Willey,* 481 Mich 868 (2008); *People v Ransom,* 481 Mich 926 (2008); *People v Rounsoville*, 481 Mich 932 (2008); *People v McCaa*, 481 Mich 939 (2008);

was wrongly decided, but has resulted in an unwarranted consumption of the resources of the courts and prosecutors, to the detriment of the public.

MCL 769.1k(1)(b)(iii) provides that at sentencing, a court may impose "[t]he expenses of providing legal assistance to the defendant." *Dunbar* was decided before this provision was enacted, but even before its enactment, the trial courts had authority to impose this cost.

In *People v Nowicki,*[5] the Court of Appeals held that a trial court had the inherent authority to require a defendant to reimburse a county for the cost of appointed counsel, albeit by means of an order that is not part of the sentence.[6] Further, MCL 769.34(6) provided that the trial court may order payment of costs, fines, and assessments as part of the sentence. The county's payment to appointed counsel is a "cost," as defined[7] by the Revised Judicature Act of 1961, which also provides that a court "shall order a specific date on which the penalties, fees and costs are due and owing" and permits waiver of penalties upon request of the defendant.[8]

Dunbar appears to be grounded in the persistent misconception that the right to counsel is adversely affected when the courts seek repayment of the cost of appointed counsel. This misconception persists, despite the United States Supreme Court's rejection of that theory. A defendant's after–the–fact contribution to the cost of appointed counsel does not overly burden the

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[5] *People v Nowicki,* 213 Mich App 383 (1995)

[6] The revision of MCL 769.1k(1)(b)(iii) to provide explicit authority for the assessment rendered obsolete the *Nowicki* requirement for an order separate from the judgment of sentence. Yet, *Nowicki* is still cited, and cases are still remanded, for a "separate order." See *Willey,* supra.

[7] MCL 600.4801(a)

[8] MCL 600.4803(1)

right to counsel.[9] Since the assessment at sentence does not burden a constitutional right, there is no justification for the judicial imposition of special rules that require a trial court to "indicate" in some fashion that it has considered a defendant's financial situation, and his ability to pay then or in the future, before imposing the cost.

Dunbar persists despite this Court having repeatedly acknowledged in analogous contexts (and even where a statute directs inquiry before assessment) that the assessment of ability to pay is relevant when sanctions are sought,[10] not when the assessment is imposed. There is no justification for treating the *imposition* of attorney fee assessments any differently than the *imposition* of other costs, such as state minimum costs,[11] for which there is no perceived requirement of prior consideration of ability to pay.

Dunbar persists even though no one can predict whether one who is indigent at sentencing will remain indigent and never be able to repay even part of the public dollars spent. Why should these public expenditures not be recovered, even in part, if possible? There is no statutory justification for depriving the public of a potential future opportunity for recoupment, and *Dunbar* provides no legitimate constitutional basis for judicial intervention to prevent that opportunity.

The *imposition* of this cost at sentence no more burdens the right to counsel than does the imposition of court costs (or state minimum costs, or fines, or restitution) burden a defendant's right to trial. In none of these other instances is a defendant's ability to pay at issue when the obligation

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[9] Id., 417 US 40, 51-53; See, *Alaska v Albert*, 899 P 2d 103, 112-113 (1995)

[10] See, *People v Music,* 428 Mich 356 (1987); *People v Hill,* 430 Mich 898 (1988); *People v Grant,* 455 Mich 221, 224, n 4 (1997)

[11] MCL 769.1j

is imposed. No right is implicated then. Rather, the right protected is the right to not be punished merely because one is impoverished, or for a non–wilful failure to pay.[12]

Amicus is unaware of any groundswell of cases where trial courts have sanctioned defendants for failing to comply with a reimbursement order without inquiry into the defendants' financial circumstances. We do not have debtor's prisons. Long–standing principles protect individuals from punishment where they do not have the means to pay the costs a court has imposed, whether those costs are probation oversight fees, state minimum costs, restitution, or repayment of public dollars spent on appointment of counsel.

The federal and Michigan constitutions guarantee that the state cannot deny individuals life, liberty, or property without due process of law,[13] and procedural due process requires safeguards in proceedings that affect those rights.[14] Thus, a court cannot revoke probation for failure to pay costs, absent evidence that the defendant is responsible for the failure, or that alternative forms of punishment are inadequate.[15] The state cannot increase confinement beyond the maximum term fixed by statute because a defendant fails to satisfy the monetary provisions of his sentence.[16]

Michigan also provides due process safeguards by publishing statutes that permit assessment of the cost of appointed counsel, by providing the opportunity to object at sentencing to the

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[12] See, *Washington v Blank,* 131 Wash2d 230, 241-242; 930 P2d 1213 (1997).

[13] U.S. Const., Am. V, XIV; Const. 1963, art. 1, § 17

[14] *Williams v Hofley Mfg Co,* 430 Mich 603, 610 (1988)

[15] *Bearden v Georgia,* 461 US 660, 672; 103 S Ct 2064; 76 L Ed 2d 221 (1983)

[16] *Williams v Illinois,* 399 US 235, 240-241, 90 S Ct 2018, 26 L Ed 2d 586 (1970)

imposition of those costs,[17] and by protecting from sanctions those too indigent to pay court–ordered costs. But *Dunbar* wrongly concluded that the Constitution instead demands that a trial court not only consider a defendant's ability to pay before ordering him to reimburse the cost of appointed counsel, but to also ensure that the record demonstrates that the court has considered this factor.[18]

Prior consideration of ability to pay was one of five constitutional requirements that a Fourth Circuit opinion concluded had "emerged" from United States Supreme Court decisions. In adopting these requirements from the Fourth Circuit's opinion in *Alexander v Johnson*,[19] *Dunbar* failed to recognize that the cited cases did not purport to prescribe the only constitutionally acceptable mechanisms for the imposition and collection of costs.

The five–part test created by *Alexander v Johnson* relied on the theory that the Supreme Court had "carefully identified" in a series of cases (discussed below) the necessary components of a constitutionally acceptable "program" to recover the costs of appointed counsel: (1) the program must guarantee the right to counsel without cumbersome obstacles and (2) provide notice and an opportunity to be heard before reimbursement is ordered, (3) the entity requiring reimbursement must consider the defendant's financial situation before ordering reimbursement, (4) the collection practices cannot be more severe than those employed for other debts, and (5) a defendant cannot be incarcerated for failure to pay when he is unable to pay.[20]

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[17] Typically, a defendant has already previously acknowledged by signature on the appointment of counsel form that he is or may be obliged to repay the cost of appointed counsel.

[18] *Dunbar,* supra, 253-254

[19] *Alexander v Johnson*, 742 F2d 117 (CA 4, 1984)

[20] Id., 124

But *Alexander v Johnson* mistook procedures that met the constitutional requirements for the constitutional requirements themselves. In *James v Strange,*[21] the United States Supreme Court considered a Kansas statute providing for civil proceedings to recover the cost of appointed counsel. The Court held that Kansas had denied equal protection[22] to this class of debtors by *denying* it exemptions and protections available to others.[23] Michigan's statutes do not similarly strip exemptions and protections from those obliged to repay the cost of appointed counsel. The Court did not reach the issue[24] of whether these post–conviction civil proceedings unconstitutionally burdened an indigent defendant's right to counsel.[25]

Relying in part on the equal protection analysis of *Strange,* the defendant in *Fuller v Oregon*[26] challenged a condition of his probation sentence that required reimbursement of the cost of appointed counsel. The Court rejected the equal protection claim because, unlike the statutes examined in *Strange*, the Oregon statutes did not deny such defendants exemptions or protections afforded to other debtors.[27] And, ''[m]ore fundamentally, the imposition of a repayment requirement upon those for whom counsel was appointed but not upon those who hired their own counsel simply

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[21] *James v Strange,* 407 US 128, 92 S Ct 2027, 32 L Ed 2d 600 (1972)

[22] No state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Am. XIV.

[23] *Strange*, supra, 407 US 128, 138-140

[24] *Strange, supra,* 407 US 128, 134

[25] See, *Gideon v Wainwright*, 372 US 335, 83 S Ct 792, 9 L Ed 2d 799 (1963)

[26] *Fuller v Oregon,* 417 US 40, 94 S Ct 2116, 40 L Ed 2d 642 (1974)

[27] Id., 417 US 40, 47

does not constitute invidious discrimination against the poor."[28] Further, a defendant's after–the–fact contribution to the cost of appointed counsel did not overly burden the right to counsel.[29]

Critically, revocation of probation for failure to pay was not a debt–collection device, but a sanction imposed only upon those who intentionally refused to obey an order of the court — those who had the ability to pay but did not pay. Granted, the Oregon statutes required that the court consider and determine a defendant's ability to pay at several points, not only at the point of sanctions for failure to pay, but before imposing the condition of probation. But, although *Fuller* noted favorably the number and breadth of these provisions, it did not conclude that the Constitution requires multiple inquiries or that the inquiry must be made before the order to reimburse, rather than upon objection when the order is imposed, or before the court may impose sanctions for failure to pay.

Fuller did not hold that prior consideration of ability to pay is constitutionally required.[30] In *Bearden v Georgia,* the trial court failed to inquire into the defendant's ability to pay before revoking probation for failure to pay and imposing a prison sentence. Amicus agrees that such an inquiry must occur before sanctions are imposed. But, as pointed out in Justice Corrigan's dissent in *People v Carter*,[31] "[n]othing in *James, Fuller, Bearden*, or *Music* states that a sentencing court must state

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[28] Id., 417 US 40, 48

[29] Id., 417 US 40, 51-53; See, *Alaska v Albert*, 899 P 2d 103, 112-113 (1995)

[30] Indeed, in *Strange,* supra, 133, the Court noted that state recoupment laws differed significantly in their particulars and observed that "any broadside pronouncement on their general validity would be inappropriate."

[31] *Carter*, supra

on the record that it considered the defendant's ability to pay when the defendant does not timely object on indigency grounds to the order requiring him to pay attorney fees."[32]

Fuller did not prescribe minimum standards that must be met. While some courts have suggested otherwise,[33] better reasoned opinions have concluded that the Constitution does not require inquiry into ability to pay at the time of sentencing.[34] The relevant time for that inquiry is instead at the point of enforced collection and when sanctions are sought for nonpayment, because the right protected is the right to not be punished merely because one is impoverished.[35]

Even where a statute refers to consideration of ability to pay at the time of assessment, absent a timely assertion of an inability to pay, a trial court is not required to inquire into a defendant's ability to pay before imposing fines and costs.[36] And, "a defendant who does not timely challenge the amount of costs waives the right on appeal to challenge an order for costs that appears on its face to be a reasonable approximation of the costs permitted by MCL 771.3(4) [now renumbered as (5)]."[37]

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[32] Id., 1071

[33] E.g. *Alexander,* supra; see *Alaska v Albert,* 899 P2d 103, 109-110 (1995) (cases collected).

[34] See fn 4, supra; *Albert*, supra,109; *Washington v Blank,* 131 Wash2d 230, 241-242, 930 P2d 1213 (1997). The *Blank* Court noted that its conclusion was also supported by common sense because "it is nearly impossible to predict ability to pay over a period of 10 years or longer." Id., 242.

[35] *Blank,* supra, 242.

[36] *Music*, supra, 361-362; *Grant*, supra (the same rule applies to imposition of restitution).

[37] *Music*, supra, 363

Amicus agrees that the sanction of incarceration may deny due process, if applied in a discriminatory fashion or without adequate procedural safeguards. Thus, as is true with an order of restitution, or for the imposition of other costs or fines, a defendant may object or inform the trial court at sentencing if the terms create undue hardship.[38]

B. Whether trial courts are required to consider a defendant's ability to repay attorney fees as articulated in *Dunbar* before ordering the defendant to commence reimbursement of attorney fees pursuant to MCL 769.1k.

C. Whether Dunbar correctly held that a challenge to an order for repayment of attorney fees may be premature until collection efforts have begun.

Neither the applicable statute[39] nor constitutional provisions require a trial court to sua sponte consider a defendant's financial circumstances before ordering that payment commence, and either enforcing that order or imposing sanctions. For those reasons, *Dunbar* both incorrectly concluded that a trial court must consider a defendant's ability to pay before imposing the cost, and correctly concluded that a challenge to the costs is premature until collection efforts have begun. Justice Corrigan's dissent in *People v Rounsville*[40] distills the point:

> [N]othing in *James, Fuller*, or *Bearden* requires a sentencing court to state on the record or in the court file that it considered a defendant's ability to pay when a defendant has not timely objected on indigency grounds to the reimbursement order: '... Supreme Court precedents compel a sentencing court to inquire into a defendant's financial status and make findings on the record when the court decides to enforce collection or sanction the defendant for failure to pay the ordered amount. ... The Alaska Supreme Court correctly explained that "*James* and *Fuller* do not require a prior determination of ability to pay in a recoupment system which treats recoupment judgment debtors like other civil judgment debtors...." *State v. Albert*, 899 P.2d 103,

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[38] See, *Music,* supra; *Hill,* supra; *Grant,* supra, 224, n 4.

[39] MCL 769.1k(b)(iii)

[40] *Rounsoville*, supra

109 (Alaska 1995). See also the Washington Supreme Court's interpretation of *James, Fuller*, and *Bearden*:

> '[C]ommon sense dictates that a determination of ability to pay and an inquiry into defendant's finances is not required before a recoupment order may be entered against an indigent defendant as it is nearly impossible to predict ability to pay over a period of 10 years or longer. However, we hold that before enforced collection or any sanction is imposed for nonpayment, there must be an inquiry into ability to pay. [*State v. Blank*, 131 Wash.2d 230, 242, 930 P.2d 1213 (1997).]' [*Carter,* supra at 1070-1071, 743 N.W.2d 918 (Corrigan, J., dissenting) (emphasis added to *Blank*).][41]

Defendants are provided notice by publication of the statute. Notice is also typically provided within the appointment of counsel form itself. Defendants have an opportunity to be heard or to contest the amount assessed at sentencing, where they may object, request a specific payment plan, or request that commencement of repayment be delayed. Because the statute provides that a court "may" impose this cost, a trial court has discretion whether to order reimbursement.[42] A defendant may request that the trial court omit or amend that assessment.

Once imposed, a defendant's obligation to reimburse the state for the cost of appointed counsel is no different than the obligation to reimburse the state for state minimum costs or court costs, or to reimburse the victim of his crime. The legislature amended the restitution statute[43] in 1997 and removed provisions relating to a defendant's ability to pay restitution,[44] so that a defendant's ability to pay is no longer a factor to be considered in the imposition of that cost.[45]

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[41] Id., 937 (Corrigan, J., dissenting) (alteration, emphasis in origianl)

[42] MCL 769.1k

[43] MCL 780.767

[44] *People v Crigler*, 244 Mich App 420, 428 (2001)

[45] *People v Gubachy,* 272 Mich App 706, 711 (2006)

Similarly, when the legislature added MCL 769.1k(b)(iii), it omitted any provision relating to a defendant's present or future ability to pay, while permitting the trial court to order the assessed amounts to be "collected at any time."[46] A defendant has no "right" to avoid assessment of this cost, or to prevent the court from collecting when and if he has the ability to pay.

Rather, individuals may not be incarcerated or sanctioned simply for being poor. This is the protected right. And there is nothing to indicate that Michigan judges either routinely ignore this basic precept, or that if they did, the practice could be effectively addressed by reviewing the record to determine whether the judge made a general reference to the Presentence Information Report.

Instead, the obligation is rightfully ongoing. Even if indigent at sentencing, a criminal may reform and become a productive member of society. He may inherit money or win the lottery. Even someone sentenced to a lengthy prison term may have funds deposited to his account from which some part of the attorney fee obligation may be satisfied (although other obligations take precedence).[47]

Contrary to Appellant's assertion that the judge and the parties know all there is to know at the moment of sentence, circumstances change over time, and ignoring this reality unjustly subverts the public's interest in recouping public funds. Under *Dunbar*'s rule, public rights are extinguished regardless of whether a once–indigent defendant later becomes able to pay his obligation. A defendant's interest in not being punished for his indigent status, and the public's right to recoup public funds, are both served when the inquiry into a defendant's ability to pay is made at the point of enforcement.

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[46] MCL 769.1k(5)

[47] MCL 769.1*l*

D. What standards should govern a trial court's determination of whether a defendant should be responsible for the repayment of attorney fees and when the repayment should begin, including what consideration, if any, should be given to a defendant's other financial obligations (such as restitution or child support), or a defendant's incarceration?

MCLA 769.1k provides that when a defendant is convicted by plea or after trial, a trial court "may" impose the cost of providing counsel. Presumably, a county (or other funding unit) may seek to recoup public funds so expended after every conviction, and it is entitled to do so under the statute. The statute does not require courts in any given funding unit to seek recoupment, and presumably a court could choose not to require reimbursement for appointed counsel. The legislature has made the assessments discretionary, and amicus does not agree that special standards are required for the imposition of these assessments.

As argued earlier, *Dunbar* was incorrect in concluding that an "ability to pay" right attaches at the moment the cost is assessed. Unless the legislature directs differently, the assessments themselves are not subject to restrictions other than those imposed by general due process rights of notice and opportunity to object.

The legislature has further provided that the assessments may be collected "at any time." after conviction.[48] Again, assuming that defendants are provided notice and an opportunity to object, the provision is limited only by the principle that a person cannot be sanctioned for failure to pay an assessment "solely because he lacks the resources to pay it."[49] "Supreme Court precedents compel a sentencing court to inquire into a defendant's financial status and make findings on the record when

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[48] MCL 769.1k(5)

[49] *Bearden,* supra, 669

the court decides to enforce collection or sanction the defendant for failure to pay the ordered amount."[50]

This principle is reflected in existing statutes and its application is a part of the daily business of trial courts. It need not be applied any differently in this context than it is when enforcing other court–ordered obligations, where a trial court considers whether a defendant is in "wilful default" and whether payment of costs will impose "manifest hardship" on a defendant or his family;[51] and, in the probation revocation context, the trial court weighs a failure to pay an assessment against a defendant's employment status, earning ability and financial resources, the wilfulness of the failure to pay, and any other special circumstances.[52]

The legislature has prioritized the order of allocation where a criminal defendant has been ordered to pay various assessments — generally, 50% of any payment is first applied to victim payments, with the remainder allocated in the following order: minimum state costs,[53] other costs, fines, supervision fees, and other assessments and payments.[54]

Where a defendant has been sentenced to prison and the state is providing for his basic needs, the legislature has determined that a prisoner's expenses are sufficiently minimal that 50% of any funds over $50.00 received in a given month may be appropriated to satisfy a number of prioritized

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[50] *Carter*, supra, 1070 (Corrigan, J., dissenting).

[51] MCL 777.3(6)(b)

[52] MCL 771.3(8)

[53] See MCL 769.1j

[54] MCL 775.22(2) and (3)

obligations.[55] A trial court may order payment through MCL 769.1*l*. If a trial court so orders, the Department of Corrections will deduct funds from a prisoner's account to satisfy the costs, fees, and restitution obligations, but the deduction only applies to 50% of amounts over $50.00 that Defendant may accumulate in a given month.[56]

If restitution has been ordered under the Crime Victims Act,[57] the entire restitution obligation must be satisfied before any of those funds may be applied to other obligations.[58] In the case before the Court, the defendant was ordered to pay $1,357.50 in restitution.[59] Where there is no restitution ordered, the funds (50% of the amount over $50.00 in a prisoner's account in a given month) may be applied to the other costs, fees, and assessments as set forth in MCL 775.22(2) and (3).

The legislature has seen fit to allocate the priority of obligations where a convicted criminal defendant is subject to various assessments, and where he has been sentenced to prison. Whether child support orders or other judgments take priority over a funding unit's efforts to recover the cost of appointed counsel, or any other cost, is within the province of the legislature. MCL 552.611, for example, provides that an order of income withholding for child support takes priority over all other process under state law against the same income.

The legislature has already given the courts the authority to seek recoupment of the cost of appointed counsel. If the cost of appointed counsel is not assessed, it can never be recovered,

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[55] MCL 769.1*l*

[56] MCL 769.1*l*.

[57] MCL 780.751, et.seq.

[58] MCL 769.1*l* provides that MCL 780.767a(1) and MCL 791.220h take priority.

[59] Sentence transcript, 17

regardless of whether a defendant becomes able to pay. If it is assessed and a defendant cannot pay it at any particular point, he is protected from sanctions by the principle that a person cannot be imprisoned merely for his poverty. If a defendant has or gains the ability to pay, the trial courts should not be precluded from recouping, even if only in some small part, those public funds that the legislature has authorized it to recoup.

E. Whether imposing a 20% late fee pursuant to MCL 600.4803(1) constitutes a impermissible collection effort or sanction for non-payment or provides a means of enforcement that exposes a defendant to more severe collection practices than the ordinary civil debtor.

The statute provides:

> A person who fails to pay a penalty, fee, or costs [[FN5]] in full within 56 days after that amount is due and owing is subject to a late penalty equal to 20% of the amount owed. The court shall inform a person subject to a penalty, fee, or costs that the late penalty will be applied to any amount that continues to be unpaid 56 days after the amount is due and owing. Penalties, fees, and costs are due and owing at the time they are ordered unless the court directs otherwise. The court shall order a specific date on which the penalties, fees, and costs are due and owing. If the court authorizes delayed or installment payments of a penalty, fee, or costs, the court shall inform the person of the date on which, or time schedule under which, the penalty, fee, or costs, or portion of the penalty, fee, or costs, will be due and owing. A late penalty may be waived by the court upon the request of the person subject to the late penalty.

The 20% late fee applies to all penalties, fees, and costs. It applies to all persons, in both civil and criminal cases.[60] It provides for delayed or installment payments, and for the waiver of the late fee upon request.[61] Despite its general application and protective provisions, Appellant asserts

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[60] See MCL 600.4801

[61] MCL 600.4803(1)

that under *James v Strange,*[62] the statute violates equal protection rights when it is applied to an order to repay the cost of appointed counsel.

In *James*, the Court held that Kansas had denied equal protection[63] to this class of debtors by denying it exemptions and protections available to others.[64] Notably, the Kansas statute explicitly stripped from defendants owing fees for court appointed counsel the protections afforded for other debts. In contrast, the statute here explicitly provides general protections and does not discriminate among classes of persons or debts. And, provisions with similar penalty percentages may be found in other statutes.[65]

Whether the statute is improperly enforced is necessarily fact-specific, as pointed out in the dissent in *Rounsoville*, supra,

> [t]he inclusion of a late-fee provision in the recoupment order is not equivalent to enforcing the recoupment order or the late fee. A sanction is not imposed until the court requires the defendant to pay the attorney fees (with the 20 percent late penalty) or sanctions him in some other way for nonpayment. Because the court has not yet enforced collection by sanctioning defendant for nonpayment, defendant's challenge to the reimbursement order is premature. See *Dunbar*, supra at 256, 690 N.W.2d 476 ("in most cases, challenges to the reimbursement order will be premature if the defendant has not been required to commence repayment"); see also *Blank*, supra at 242, 930 P.2d 1213.[66]

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[62] *James v Strange,* 407 US 128, 92 S Ct 2027, 32 L Ed 2d 600 (1972)

[63] No state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Am. XIV.

[64] *Strange*, supra, 407 US 128, 138-140

[65] See MCL 141.682 (25%) and MCL 421.62 (20%).

[66] *Rounsoville*, supra, 938 (Corrigan, J., dissenting)

If enforced, the collection of late penalties appears to be subject to the same provisions as those for the collection of other obligations owed pursuant to court order.[67] Unlike the Kansas statute considered in *Strange*, no protections have been stripped only from those ordered to reimburse the cost of appointed counsel.

Summary

The Sixth Amendment does not include a right to be forever exempt from an obligation to repay the state for the costs of providing representation,[68] nor does it require trial courts to either predict the future or forfeit the right of the funding unit to recover the cost of providing legal representation.

Since a defendant may not be incarcerated for failing to reimburse the costs of appointed counsel where he is unable to pay,[69] a defendant's interests are protected by his right to assert an inability to pay, should that be the case, if sanctions are sought for his failure to submit payment. This Court should overrule *Dunbar's* requirement that a trial court indicate on the record that it has considered a defendant's financial circumstances before directing repayment of the cost of appointed counsel.

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[67] MCL 12.133; MCL 12.135; See MCL 600.6075 (arrest on civil process)

[68] See generally *Fuller,* supra at 52-53.

[69] *Bearden v Georgia*, 461 US 660, 103 S Ct 2064, 76 L Ed 2d 221 (1983)

Relief

WHEREFORE, amicus requests that this Court overrule the *Dunbar* decision requiring that the record establish that the trial court considered a defendant's ability to pay before assessing the cost of providing appointed counsel.

Respectfully submitted,

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research, Training, and Appeals

MARILYN A. EISENBRAUN (P35968)
Assistant Prosecuting Attorney
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
313-224-2698

Dated: March 30, 2009